STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2011
v CLIFTON WHITE a/k/a CRISTEN WHITE, Defendant-Appellant.	No. 292606 Wayne Circuit Court LC No. 09-002357-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CRISTEN WHITE a/k/a CLIFTON WHITE, Defendant-Appellant.	No. 296173 Wayne Circuit Court LC No. 07-004418-FH

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In Docket No. 292606, defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Because of these convictions, the trial court also found defendant in violation of his parole, and defendant appeals that determination in Docket No. 296173. This Court consolidated these cases for our review. Because sufficient evidence showed that defendant possessed a firearm in contravention of both MCL 750.224f and MCL 750.227b, and no prosecutorial misconduct occurred at trial, we affirm in Docket No. 292606. Because defendant has shown no error with regard to his convictions in Docket No. 292606, he has not demonstrated that it was error for the trial court to conclude that defendant was in violation of his parole for his earlier convictions, and therefore we likewise affirm in Docket No. 296173.

Officer Lamar Penn of the Detroit Police Department Narcotics Section testified that he was the shotgun man on a raid crew executing a search warrant at 5638 Koppernick in Detroit on

January 14, 2009. Penn testified that as the team exited the raid van and was about to execute the search warrant he ran toward the address and yelled "Police – search warrant." At that exact time Penn saw defendant exiting 5640 Koppernick which was attached to 5638 Koppernick in a duplex house. The homes shared a common porch.[1] Defendant froze on the porch and put his hands up as he alighted from the entry door of 5640 Koppernick. Penn stopped defendant right where he stood for officer safety during the raid. Defendant left the door wide open as he came out of the house. Penn stated that as defendant put his hands up in the air he tried to lean his left hand into the house and Penn saw defendant drop a plastic baggie into the house onto the living room floor. While Penn did not see what was in the baggie, from his experience he suspected it was narcotics. Penn turned defendant over to another member of the raid crew while he took part in the raid on 5638 Koppernick.[2] After clearing 5638 Koppernick which took about two minutes, Penn returned to 5640 Koppernick. Penn stated that on walking in the front door he entered a small living room that was about 8 feet by 8 feet. He also walked into a bedroom where he saw a young black female lying under the covers. Penn testified that he did not seize any bills or other mail addressed to defendant at 5640 Koppernick.[3] He also testified that the address defendant provided to police as his residence was 5934 Larkins, not 5640 Koppernick. Penn testified that he believed from the condition of 5640 Koppernick, it should have been vacant based on the condition of the dwelling. There was ice and water coming from the kitchen area under the sink running through the living room and ice on the floor. No mail or magazines were found anywhere inside 5640 Koppernick.

Officer Radames Benitez of the Detroit Police Department Organized Crime Section testified that he was the shotgun backup man on the raid squad executing a search warrant at 5638 Koppernick on January 14, 2009. When they arrived at the location, Benitez saw defendant coming outside the door for 5640 Koppernick. Benitez testified that Penn told him that he saw defendant drop something. Benitez detained and secured defendant with handcuffs after Penn froze him on the porch. The door was open and defendant was right there at the door so Benitez just looked inside and observed the baggie of suspected heroin there on the floor of the entryway to the living room. Benitez testified that he confiscated the narcotics, and later took them back to the station where he entered them into evidence.

Benitez testified that when he confiscated the narcotics, because the door was open he could see right inside the interior of the location. He looked inside the room and saw an AK-47

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[1] Eventually police determined that the duplex was actually divided into three different living quarters with an apartment upstairs accessible by an outside door in the back of the duplex leading to a stairway. The duplex had three electric meters associated with each of the living quarters.

[2] Penn testified that 5638 Koppernick had at least two treadmills set up for dogs and several pit bulls.

[3] The listed owner of 5640 Koppernick from the tax rolls is one Angelica Campose who is not involved in this case.

rifle laying on top of a sofa directly opposite the door in the small living room. Benitez estimated that the sofa was about 15 feet away from the doorway. The AK-47 was sitting on top of the sofa cushions and was not covered by anything. There was nothing else on the couch. Benitez immediately went in and recovered it because he did not know if there was anyone else in the house. The AK-47 was a semi-automatic and was loaded, meaning there was a live round in the chamber as well as a magazine (a/k/a banana clip) attached that contained 22 additional live rounds. Later, Benitez put the AK-47, the magazine, and the 23 live bullets into evidence.

Officer Magdalena McKinney of the Detroit Police Department Narcotics Section testified that she was working outside security on the raid crew executing the search warrant at 5638 Koppernick in Detroit on January 14, 2009. McKinney encountered Brandi Webb, a 19-year-old black female at 5638 Koppernick in the living room of the residence after police cleared her from the bedroom. McKinney wrote Webb a ticket for disorderly conduct and then she was released at the scene.

Sergeant Robert Turner of the Detroit Police Department Narcotics Section testified that he was the Officer in Charge of the raid crew executing the search warrant at 5638 Koppernick in Detroit on January 14, 2009. Turner testified that the AK-47 was not preserved for fingerprints by the department. Turner stated that in his experience, when weapons are submitted for fingerprints, less than one percent come back where forensic analysis has been able to lift fingerprints. Turner testified that in his opinion, 5638 Koppernick was a vacant house (or dope house) that had been abandoned and that while people were inside, they did not live there. Turner testified that police confiscated $141 from defendant's person at the time of arrest.

The parties agreed to two stipulations at the close of the prosecution's case. The first was that the suspected narcotics material found in the baggie was 1.58 grams of heroin. The second stipulation was that defendant had previously been convicted of a felony and his rights to possess a weapon were not restored by the date of the incident, January 14, 2009.

Defendant testified on his own behalf at trial, identifying himself as Clifton Earl White.[4] Defendant stated that he has resided with his fiancée, Lateesha Stanley, at 934 Larkins for about two years. Defendant stated that on the day of the incident he had just arrived at 5640 Koppernick to bring Brandi Webb, his girlfriend, some food from Burger King. Defendant stated that he drove from Burger King directly to 5640 Koppernick, knocked on the door, and Webb let him inside the house. The two went to the back bedroom where Webb started eating and they talked for a few minutes.[5] At that point, defendant heard police screaming "Search warrant. Raid. Get down. . . ." Defendant testified that he left the bedroom and walked to the front door. He stated that he heard the police on the porch and then he heard a loud noise as the

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[4] Defendant testified that he has also gone by the names: Ronnell Boyd, Steven Earl Smith, Christen White, Tim Brown, and possibly Deshaun Jones, and James Stanley.

[5] Defendant testified that he ate his Burger King on the way from Burger King to 5640 Koppernick.

police banged on the door of 5638 Koppernick so he opened the front door to see what was happening. The police told him to freeze. Defendant testified that he asked, "What's going on?" According to defendant, one of the officers answered, "Your fat ass know what's going on. Wherever you at there's drugs at." At trial, defendant opined that police made that statement to him because they knew him from around the neighborhood because he has sold drugs in the past and police knew that he had. Defendant testified that he was not selling drugs on the date of the incident, January 14, 2009, that he did not sell drugs out of 5638 Koppernick, and that on that day, he was not waiting for a drug drop off at the time of the raid.

Defendant stated that, police had a gun on him and called him out of the house. Officers asked him his address and defendant stated that he did not live at 5638 Koppernick and provided them his address at 934 Larkins. Defendant stated that he could not fit into the back of the squad car so police transported him to the station in the back of the raid van.

Defendant stated that he does not have a driver's license or state ID. Defendant stated that he did not have any drugs in his hand when he walked to the front door to see what was happening with the police. He also testified that if he would have had drugs on him he would have had enough "common sense" not to have them in his hand when walking to the front door to see what was happening with police. Defendant also testified that when he was walking out of the house he did not see an AK-47 on the couch, never handled the weapon, and that it is not his gun. He also stated that he did not have the rifle for protection while selling drugs because he was not selling drugs and it was not his rifle. Defendant agreed that the whole living room area at 5638 Koppernick was about the size of the jury area. He also testified that he does not use drugs. The prosecutor asked defendant twice where Webb was, and defendant answered that he did not know.

The matter went to the jury and the jury convicted defendant as charged. Defendant now appeals as of right.

In Docket No. 292606, defendant first argues that there was insufficient evidence at trial to support his convictions of felon in possession of a firearm, MCL 750.224f and felony firearm, MCL 750.227b because the prosecution did not present evidence showing that defendant had the ability to control the weapon found and that he actually or constructively possessed it. When reviewing a claim for sufficiency of the evidence, all evidence is viewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Conflicting evidence must be resolved in favor of the prosecution. *Id*. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant specifically asserts that there was insufficient evidence presented to establish that he possessed the AK-47 rifle found in on the couch in the living room at 5638 Koppernick because "[t]here are no facts contained in the lower court record upon which to build an inference that [defendant] had any dominion or control over the weapon, let alone possessed it, either actively or constrictively." It is well settled in Michigan that possession may be actual or constructive, joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

Constructive possession exists when the defendant knew the gun's location and the gun was reasonably accessible to him. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). Possession is a question of fact for the fact-finder and can be established by circumstantial evidence. *Id*. at 437.

Pursuant to the felon in possession of a firearm statute, MCL 750.224f, unless certain exceptions apply, "a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm." The statute focuses on the criminal status of the possessor, and its purpose is to keep guns out of the hands of those most likely to use them against the public. *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001).

At trial, the parties stipulated on the record to the fact that defendant was a felon whose right to possess a firearm had not been reinstated. Police found the gun in plain view lying on top of a couch in a small living room at most 15 feet away from where defendant was standing in the doorway of the residence when he encountered police. Defendant had just exited that room to open the door of the house and was standing in the doorway with the door wide open. Defendant admitted that the living room was a small room. He also admitted that he walked from the back bedroom of the house where Webb was eating Burger King through the living room where the gun was on the couch to the front door when he heard the police—although defendant testified that he did not see the gun and did not own the gun. There was no one else in the room where the gun was found. While defendant asserts that he did not see the gun in the small room, the jury was free to credit his testimony or not. The jury was free to draw reasonable inferences from the evidence, including the inference that defendant possessed the semi-automatic weapon that was close by and readily accessible to him while he was in possession of heroin, especially considering the fact that defendant admitted to the jury that he had sold drugs in the past and was known in the neighborhood for selling drugs. *Hardiman*, 466 Mich at 428. That defendant's girlfriend, Webb, was also present in the house at the time of the raid and could also have possessed the AK-47 did not negate constructive possession by defendant because possession may be joint. *Hill*, 433 Mich at 470. Because the testimony indicated that the police discovered defendant in plain proximity of the subject firearm at the instigation of the raid, the evidence was sufficient for a rational trier of fact to find that the essential elements of felon in possession of a firearm were proven beyond a reasonable doubt. *Harmon*, 248 Mich App at 524.

The felony firearm statute, MCL 750.227b(1), states that, "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony . . . ." See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The prosecutor also presented sufficient evidence for a jury that both elements were also established. The evidence showed that defendant possessed the gun during the commission of two felonies: felon in possession of a firearm, which we discussed above and may be used as the underlying felony for felony-firearm, see *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003), and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), which defendant does not challenge on appeal.

Also in Docket No. 292606, defendant argues that the prosecutor committed misconduct by repeatedly inquiring why defendant had not brought Brandi Webb to testify on his behalf, thereby inferring that defendant had the burden of proof and duty to corroborate his own

testimony, and inappropriately shifted the burden of proof from the prosecution to defendant. Defendant objected to the line of questioning at trial, thus, we review this preserved claim of prosecutorial misconduct de novo to determine whether the alleged error denied the defendant a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

The great latitude given to prosecutors allows them to argue the evidence and all reasonable inferences derived from that evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "[A] prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). For claims of prosecutorial misconduct, the question for the court is whether the prosecution's statements had the effect to deny the defendant a fair trial. *Bahoda*, 448 Mich at 263.

Here. while defendant was on the witness stand, the prosecutor asked him why he did not call his girlfriend, Webb, to testify at trial. The following exchange occurred:

> *Prosecutor*. Where is Brandi at?
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> *Defendant.* I don't know.
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> *Prosecutor*. Hey where's Brandi at?
>
> *Defendant.* I don't know.
>
> *Prosecutor*. She's not here to --
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> *Defense Counsel.* Where is she at, your Honor, because it's not my burden of proof to produce any witnesses.
>
> *The Court.* The objection is sustained. All right.
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> *Prosecutor*. Well, Judge, I mean the defense is putting on a case. I can certainly talk about people who aren't here to corroborate.
>
> *Defense Counsel.* Why doesn't he call her? I [sic] I'd like to ask her questions too.
>
> *Prosecutor*. Hey he's got the subpoena power just like me, Judge.
>
> *The Court.* Hold it.
>
> *Defense Counsel.* I don't have a police force to go find her.
>
> *The Court.* Now wait a minute.
>
> *Prosecutor*. You've got a drug force you can use.
>
> *The Court.* Both of you have subpoena powers; that's quite true.

Prosecutor. I got nothing, Judge.

Defense Counsel. Your Honor, I move to strike the last comment from the prosecutor.

The Court. The jury is instructed [sic] disregard the last comments that are made by both counsels [sic].

A prosecutor properly may respond to defense arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). And, although a defendant has no burden to produce any evidence, once a defendant advances evidence or a theory that, if proven, might exonerate him, the prosecutor's comment on "the inferences created," including a defendant's failure to call witnesses or produce corroborating evidence, "does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995).

Here, defendant's theory of the case was that the police had an issue with him because he was a known drug dealer in the area and were setting him up to be arrested for a crime he did not commit. He repeatedly insinuated that the police were attempting to "put a case on him." He stated that he did not own or possess the AK-47 found at the scene and that he had not seen it on the sofa in the living room before they arrived. Defense counsel also solicited testimony from Turner that the AK-47 was not preserved for fingerprints by the police department. The prosecutor could properly respond to this evidence and the theory advanced by defendant that the police were setting him up. *Fields*, 450 Mich at 115-116. Police found only two people in the house, defendant and Webb. Defendant testified that Webb had met him at the front door of the house and let him in when he arrived with the Burger King. Webb would have had to walk through the living room passed the sofa twice, once to open the front door and then back through the living room to the bedroom where police found her in bed. If called, Webb could have corroborated defendant's testimony and bolstered his theory of the case by testifying that the AK-47 was not in the house before the police arrived. Thus, defendant has not shown prosecutorial misconduct on this record. Furthermore, defense counsel objected to the prosecutor's questions, the trial court sustained the objection, and instructed the jury to disregard the comments by both the prosecutor and defense counsel. Any error caused by the prosecutor's questions was remedied by the trial court's instructions. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009) (internal quotations omitted).

Finally, in Docket No. 296173, defendant argues that it was error for the trial court to conclude that defendant was in violation of his 2007 parole when he denied committing the 2009 violations, the prosecution failed to offer sufficient evidence that defendant possessed a firearm, and his convictions were a result of prosecutorial misconduct. Because defendant has shown no error with regard to his convictions in Docket No. 292606 that formed the basis of his parole

violations, he has not demonstrated that it was error for the trial court to conclude that defendant was in violation of his parole for his earlier 2007 convictions.[6]

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

[6] Defendant has not challenged or appealed his felony drug possession conviction.